Mohamad Radhi bin Yaakob v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-59 OF 1989
JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI SCJ AND WAN YAHYA J
20 JULY 1991

Criminal Procedure — Dangerous drugs — Trafficking in — Statutory presumptions to prove possession and trafficking — Burden on accused to rebut presumptions — Dangerous Drugs Act 1952, ss 12(2), 37(d) & 37(da)

Evidence — Burden of proof — Reliance by prosecution on statutory presumptions to prove essential ingredients of charge — Shifting of burden of proof to defence to rebut presumptions — Balance of probability

The appellant in this case was charged with trafficking in a dangerous drug, to wit, cannabis. The evidence for the prosecution was that police officers saw the appellant carrying a bag slung across his shoulders and when the police approached him he ran away and threw the bag into the padi field. At that time the appellant was with another man, Hashim, who escaped and could not be traced. The contents of the bag was found to be 544.18 g of cannabis and the presumptions arose that the appellant was in possession of the drug and that he was trafficking in it. He was called for the defence. The learned trial judge after hearing the evidence came to a finding of fact that the appellant had not rebutted the statutory presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the Act') on a balance of probability, that he was in possession of the drugs and he stated that it followed that the presumption of trafficking under s 37(da) was also not rebutted. The learned trial judge so held as he was not satisfied that the appellant and his witnesses were telling the truth. The appellant was convicted and sentenced to death. He appealed to the Supreme Court.

Held, allowing the appeal:

(1) Even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case.

(2) Where the prosecution relies on available statutory presumptions to prove one or more of the essential ingredients of the charge, the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

(3) Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on balance of probability the defence has rebutted the statutory presumptions of trafficking under s 37(da) of the Act as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) of the Act has not been rebutted. In this case the failure to do so was a material misdirection and was fatal to the conviction.

(4) The learned trial judge has acted on the wrong premise that once the appellant had failed to rebut the presumption under s 37(d) of the Act, the presumption under s 37(da) of the Act had also not been rebutted. On the facts of this particular case this error of law had occasioned a miscarriage of justice.

[Bahasa Malaysia summary

Perayu di dalam kes ini telah dituduh mengedar dadah berbahaya iaitu cannabis. Keterangan yang diberi oleh pihak pendakwa menunjukkan bahawa pegawai-pegawai polis telah ternampak perayu membawa bag di atas bahunya dan apabila pihak polis telah mendekatinya ia telah melarikan diri dan membuang beg itu ke dalam sawah padi. Pada masa itu perayu adalah bersama dengan seorang lain dikenali sebagai Hashim, yang juga telah melarikan diri dan kini tidak dapat dikesan lagi. Isi beg itu mengandungi 544.18g cannabis dan anggapan timbul bahawa cannabis itu adalah di dalam milikan perayu dan ia telah mengedarnya. Ia telah diminta membela dirinya. Hakim yang arif selepas mendengar keterangan, telah membuat keputusan fakta bahawa perayu tidak berjaya mematahkan anggapan di bawah s 37(d) Akta Dadah Berbahaya 1952 ('Akta itu') bahawa atas imbangan kebarangkalian dadah itu adalah dalam miliknya. Beliau berkata berikutan daripada itu anggapan di bawah s 37(da) bahawa yang dituduh telah mengedar dadah itu juga tidak dipatahkan. Hakim yang arif memutuskan demikian oleh kerana beliau tidak berpuashati perayu dan saksi-saksinya telah berkata apa yang benar. Perayu telah disabitkan dengan kesalahan itu dan telah dijatuhkan hukuman mati. Ia telah merayu kepada Mahkamah Agung.

Diputuskan, membenarkan rayuan:

(1) Sungguhpun seorang hakim tidak menerima atau mempercayai huraian orang yang tertuduh, orang tertuduh itu tidak boleh disabitkan sehingga mahkamah berpuashati atas sebab yang mencukupi bahawa huraian yang diberi itu tidak membangkitkan keraguan yang munasabah terhadap kes pendakwa.

(2) Apabila pihak pendakwa bergantung kepada anggapan statutori untuk membuktikan satu atau lebih daripada unsur penting tuduhan itu, beban membukti khusus, dibezakan dari beban membukti am, berpindah kepada pihak pembela untuk mematahkan anggapan-anggapan itu atas imbangan kebarangkalian, yang mana dari segi pihak pembela adalah lebih berat daripada beban menimbulkan keraguan yang munasabah, akan tetapi lebih ringan daripada beban pendakwa membukti hingga tidak ada keraguan yang munasabah.

(3) Kecuali jika keterangan di dalam kes yang tertentu jelas tidak memerlukan sedemikian, adalah menjadi kewajipan mahkamah menimbangkan sama ada atas imbangan kebarangkalian keterangan bagi pihak pembela telah mematahkan anggapan di bawah statut bahawa si tertuduh telah mengedar di bawah s 37(da) Akta itu sebagai perkara yang berasingan, sungguhpun mahkamah telah berpuashati atas imbangan kebarangkalian bahawa anggapan milikan di bawah s 37(d) Akta itu telah tidak dipatahkan. Di dalam kes ini kegagalan membuat demikian adalah sesuatu salah arahan yang serius dan boleh membatalkan sabitan itu.

(4) Hakim yang arif telah bertindak atas sangkaan yang tidak sah iaitu sebaik sahaja perayu telah gagal mematahkan anggapan di bawah s 37(d) Akta itu, anggapan di bawah s 37(da) juga tidak dipatahkan. Atas fakta-fakta di dalam kes ini kesilapan dari segi undang-undang itu telah membawa salah laksana keadilan.]

Cases referred to

1 *PP* v *Saimin & Ors* [1971] 2 MLJ 16 (refd)
2 *Mat* v *PP* [1963] MLJ 263 (follod)
3 *Munusamy* v *PP* [1987] 1 MLJ 492 (refd)

Legislation referred to
Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(da)

Appeal from: Criminal Trial No 58-3 of 1987 (High Court, Seremban)

Karpal Singh for the appellant.
Foo Lee Mei (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): The appellant was convicted and sentenced to death on a charge of trafficking in 544.18g of cannabis in the following amended terms:

> That you on 12 July 1986 at about 1.20am at Kampong Tengah of Batu Kikir, in the District of Jempol, in the State of Negeri Sembilan Darul Khusus, did on your own behalf traffic in dangerous drug, to wit 544.18g of cannabis and that you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Rev 1980) and punishable under s 39B(2) of the same Act.

In this case the learned trial judge had accepted the prosecution evidence that on 11 July 1986 at about midnight a party of four police officers led by Insp Zabidi were on motorcycle crime prevention patrol at Kampong Tengah, Jempol. At about 1.20am (12 July 1986), as the police party was leaving the kampung road for the main road, they came across the appellant walking with another man identified as one Hashim. The learned judge had no reason to disbelieve the evidence of the police that at the material time the appellant was carrying the cannabis in a bag slung across his shoulders, and when Insp Zabidi stopped them and identified himself as a police officer, Hashim ran away while the appellant threw the bag he was carrying into the padi field by the side of the road. Despite being pursued by the police, Hashim apparently managed to escape and could not be traced until today, but the appellant was apprehended after a short struggle although he denied trying to run away.

From the evidence of the government chemist, Mr Ho Peng Hee ('PW2') it was established beyond doubt that the 1,773 paper rolls carried by the appellant contained 544.18g of cannabis as defined in s 2 of the Dangerous Drugs Act 1952 ('the Act'). The prosecution relied on the statutory presumption under s 37(d) of the Act that the appellant, being in custody or control of the bag containing the dangerous drug, should be presumed until the contrary was proved to have been in possession of such drug, and should also until the contrary was proved be deemed to have known that the drug was cannabis. Since the quantity of cannabis recovered exceeded 199g, the prosecution also relied on the statutory presumption under s 37(da) to prove that the appellant was trafficking in the said dangerous drug.

The learned judge was accordingly correct in law in calling for the defence after holding that the prosecution had made out a prima facie case against the appellant which if unrebutted would warrant a conviction.

The appellant gave evidence on oath and called eight other witnesses to prove, firstly, that Hashim was the owner of the bag containing the cannabis and that he was merely an innocent and momentary carrier of the bag, and secondly, it was Hashim and not he who was trafficking in the cannabis. The appellant's father ('DW4') and mother ('DW5') gave evidence to corroborate his story that Hashim was in their house that night watching TV until 11pm when he and the appellant left the house to buy cigarettes. On arrival near the shop, the appellant went to purchase cigarettes whilst Hashim approached a group of three persons — DW6, DW7 and DW8 who were then sitting under a tree. When the appellant came out of the shop, he approached the three persons, one of whom was his own brother ('DW7') and was informed that Hashim had gone away for a while on a motorcycle borrowed from one of them. So the appellant waited there for Hashim to return and had a chat with the three persons. After about one and half hours Hashim returned and was seen carrying a bag. The appellant and Hashim then walked back to the house of the appellant's parents. On the way Hashim wanted to urinate and asked the appellant to hold the bag for him momentarily. It was soon after this that police appeared on their motorcycles. He saw Hashim running away and he himself felt frightened and threw the bag away, but denied attempting to run away. After his arrest the appellant took the police to his parents' house where the police made a search and recovered clothing belonging to Hashim.

The shopkeeper, Mustaffa bin Yusof ('DW3'), confirmed that the appellant did come and buy some cigarettes from his shop that night. ASP Mohd Hanafiah bin Ismail ('DW2') of the Anti-Narcotic Special Branch also testified of the abortive police attempts to trace the whereabouts of Hashim. There was however no dispute that at the time of the appellant's arrest, he was in the company of Hashim. In short Hashim was not a fictitious person.

The last defence witness was Norazam bin Mohamed ('DW9'). He testified that he was arrested the same night for possession of cannabis which he had purchased from Hashim. Fifty rolls of cannabis were sold to him on 11 July 1986 at about 5pm. The notes of evidence showed that in the course of cross-examination, the deputy public prosecutor had referred him to his previous statement to the police, but nothing further was done to impeach his credit, with the result that his evidence remained admissible for consideration by the court on the issue of who was actually trafficking in cannabis on the night of 12 July 1986. The fact that

Hashim was trafficking in drugs when he sold cannabis to Norazam was not seriously challenged; nor was the fact of Norazam's arrest for possession of cannabis. There was therefore nothing inherently improbable that several hours later, Hashim continued to be trafficking in cannabis in that kampung when found in the company of the appellant.

In dealing with the defence, the learned trial judge stated at p 9 of his grounds of judgment as follows:

> The court has taken time to consider very carefully all the evidence in its entirety. The onus on the defence is to rebut the statutory presumptions on the balance of probability, especially the presumption under s 37(d), the presumption of possession and knowledge of the nature of the drug. Defence need not rebut the trafficking presumption of s 37(da) if defence has succeeded in rebutting the presumption of s 37(d). The defence can also raise a reasonable doubt where possible in the prosecution's case to be entitled to an acquittal.

Further down at p 13, his Lordship continued:

> Was the accused telling the truth? Were the three people (DW6, DW7 and DW8) sitting under the ketapang tree telling the truth? It is purely a question for the court to evaluate the evidence and make a finding on who are telling the truth and who are not telling the truth.

In this connection, counsel for the appellant had referred to us the case of *PP* v *Saimin & Ors*[1] where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution's case beyond reasonable doubt. We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat* v *PP*[2] go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found that the learned trial judge offered practically no reason why the defence, notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt in the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. To earn an acquittal at the close of the case for the prosecution under s 173(f) or s 180 of the Criminal Procedure Code, the court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (*Munusamy* v *PP*[3]). If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of judges rightly prefer to adopt straightaway the legally established 'reasonable doubt' test, rather than to delve in the 'believable and convincing' test before applying the 'reasonable doubt' test.

The other crucial issue which had arisen in this appeal was the manner in which the learned judge had approached the law on the right of the appellant to rebut the two applicable statutory presumptions under the Act. In the penultimate paragraph of his grounds of judgment the learned judge said at pp 115 to 116:

> It is a finding of fact that the defence has not rebutted the statutory presumption of s 37(d) on the balance of probability at all *and it follows that the presumption of s 37(da) is also not rebutted.* Nor has the defence raised any reasonable doubt in the prosecution case. And it is a finding of fact that the prosecution case against the accused has been proved beyond any reasonable doubt. (Emphasis supplied.)

Whilst we could not disagree with what the learned judge had said earlier in his judgment that if the defence had succeeded in rebutting the presumption of possession under s 37(d), there was no need to rebut the

presumption of trafficking under s 37(da), it did not follow that the presumption of trafficking would become irrebuttable merely because the defence had failed to rebut the presumption of possession. In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

On the issue of trafficking, we found that the learned judge had failed to sufficiently consider the evidence of the defence witnesses, particularly that of DW9 which clearly indicated that on the night in question Hashim was in all probability the trafficker of the cannabis. In our view, the learned judge had acted on the wrong premise that once the appellant had failed to rebut the presumption under s 37(d), the presumption under s 37(da) became irrebuttable so as to relieve the court from the duty to consider separately on balance whether the presumption under s 37(da) had been rebutted. In our view, on the facts of this particular case, this error of law had occasioned a miscarriage of justice.

We, therefore, allowed this appeal by quashing the conviction and setting aside the death sentence. In the circumstances of this case, we substituted conviction under s 12(2) of the Act. Both the learned DPP and counsel for the appellant informed us that the provision for increased punishment for possession of cannabis under s 39A only came into force after the date of commission of this offence. In the circumstances, and after hearing submission in mitigation of sentence, we imposed a prison term of five years from today (21 May 1991), which was then the maximum term under the section before amendment.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Hongkong & Shanghai Banking Corp v Yip Kim Khoon

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D1-29-13725-89
SHAIK DAUD J
3 JUNE 1991

Bankruptcy — Bankruptcy petition — Petition filed in wrong court — Petition ought to be filed in court of the State in which judgment debtor carried on business for greater part of year preceding petition — Whether petition bad in law — Failure to disclose security in petition — Security given by third party — Whether entitled to benefit of security — Bankruptcy Act 1967, ss 2 & 5 — Bankruptcy Rules 1969, r 101(1) & (2)

Civil Procedure — Filing of petition — Petition not filed in court of State where judgment debtor carried on business — Whether petition bad in law

The petitioner had filed a bankruptcy notice based on a judgment obtained on 19 August 1987. Following this, a creditor's petition was taken out. The judgment debtor opposed the petition on two grounds: (1) that the petition was filed in the wrong court contrary to r 101(1) and (2) of the Bankruptcy Rules 1969, and (2) that the creditor was a secured creditor, and contrary to s 5(2) of the Bankruptcy Act 1967, the creditor failed to state in its petition whether it was willing to give up its security for the benefit of the creditors or give an estimate of the value of the security.

Held, dismissing the petition :

(1) The provisions of r 101(1) and (2) are very clear and unambiguous. It is mandatory and the petition must be filed in the particular State in which the debtor does his business for a greater part of one year preceding the petition. The creditor cannot choose or elect to file in the State more convenient to him. In this case, there is clear evidence which had not been rebutted, that although the debtor normally resides in Selangor, he had carried on his business in Johor Bahru since November 88, well over a year immediately preceding the date of the petition. The petition is bad in law and ought to be set aside.

(2) The creditor failed to disclose in the petition that by a deed of assignment, the entire rights and interests in the property identified as Lots 42-IJ and 42-IK 1st Floor City Towers Kuala Lumpur had been assigned as security. The fact that the property belonged to a third party does not deprive the judgment debtor of the benefit of the security which the creditor may have against the principal debtor. A surety, which the judgment debtor was, is for all intents and purposes a debtor to the judgment creditor.

[Bahasa Malaysia summary

Pempetisyen telah memfailkan satu notis kebankrapan berdasarkan satu penghakiman yang diperolehi pada 19 Ogos 1987. Berikutan dengan ini, satu petisyen pemiutang telah dikeluarkan. Penghutang penghakiman mencabar petisyen itu atas dua alasan: (1) bahawa petisyen itu difailkan di dalam mahkamah yang salah berlawanan dengan k 101(1) dan (2) Kaedah-Kaedah Kebankrapan 1969, dan (2) bahawa pemiutang adalah pemiutang bercagar, dan berlawanan dengan s 5(2) Akta Kebankrapan 1967, pemiutang gagal menyatakan di dalam petisyennya sama ada ia rela melepaskan cagarannya